IN THE

Supreme Court of the United States

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October Term, 1944

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No. 385

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J. L. BRANDEIS & SONS,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

—o—o—

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

—o—o—

PETITION FOR REHEARING

—o—o—

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Law Briefs—OMAHA LINO-SLUG CO.—418 So. 15th St.

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To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The Petitioner, J. L. Brandeis & Sons, respectfully submits this, its Petition for Rehearing, pursuant to Rule 33 of the Rules of this Honorable Court, and, in support of its Application to Vacate the Order of Denial of the Petition for Writ of Certiorari, heretofore entered, and to grant such Writ, respectfully shows:

PETITION FOR REHEARING APPROPRIATE

Apart from the consideration that the Petition for Rehearing is a matter of right,[1] we suggest the instant Petition for Rehearing is appropriate in the light of the recent pronouncement[2] by this Honorable Court, particularly qualifying this case for rehearing. Like rehearings have been granted in cases indicated in the footnote,[3] particularly where an outstanding public interest has subsequently become manifest.[4]

PRELIMINARY STATEMENT

The denial of Certiorari herein on October 16, 1944, fell with stunning impact upon the Retail circles of the

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1 **R. Simpson & Company, Inc., v. Commissioner of Internal Revenue,** 321 U. S. 225, 88 L. ed. (adv. ops.) 452, 64 S. Ct. 496.

2 **R. Simpson & Company, Inc., v. Commissioner of Internal Revenue,** supra, decided February 14, 1944, the Court saying:

> "It sometimes is desirable in the light of events to grant a previously denied writ of certiorari, as where it appears the question must later be taken because of conflict. A grant in such a case not only enables us to do justice to the party if it appears that he has the right of the controversy, but also it gives us the benefit of argument and examination of the additional or contrary aspects of the question presented by the case."

3 **Buie v. United States,** 317 U. S. 689, 87 L. ed. 561, 63 S. Ct. 439; **Aguilar v. Standard Oil Company,** 317 U. S. 622, 87 L. ed. 504, 63 S. Ct. 433; **International Shoe Company v. Federal Trade Commission,** 279 U. S. 832, 73 L. ed. 982, 49 S. Ct. 478; **Olmstead v. United States,** 276 U. S. 609, 72 L. ed. 729, 48 S. Ct. 204; **United States ex rel. Robinson v. Johnston,** 316 U. S. 649, 86 L. ed. 1732, 62 S. Ct. 1301; **Schriber-Schroth Company v. Cleveland Trust Company,** 305 U. S. 47, 83 L. ed. 34, 59 S. Ct. 8; **Brinkerhoff-Faris Trust & Savings Company v. Hill,** 280 U. S. 550, 74 L. ed. 608, 50 S. Ct. 152.

4 **Group No. 1, Oil Corporation v. Bass,** 282 U. S. 820, 75 L. ed. 739, 51 S. Ct. 88.

Nation,[5] particularly because of the realization that the denial of Certiorari was tantamount to the extension of coverage of the National Labor Relations Act to over four thousand like Retail Department Stores throughout the Nation, some twenty-five thousand other Retail outlets, and unnumbered thousands of merchants, the necessities of whose businesses required the stocking of their shelves from out-of-state sources. Local retail selling—for upwards of five years confidently assumed not to be within the influence of the Wagner Act, an assumption shared even by the National Labor Relations Board itself—had overnight assumed National aspects theretofore unheard of. The Retail Trade, accordingly, was profoundly amazed at the sudden enlargement of the orbit of Federal Control of Employment Relations.

NEW QUESTIONS PRESENTED

It is earnestly submitted that, before such wholesale envelopment of the Retail Trade results, the question should, at least, have the benefit of pervasive discussion before this Honorable Court—especially in view of the array of conflicting philosophies of lower Court decisions portrayed in our original Petition for Writ of Certiorari, and the Brief and Reply Brief, respectively, in support thereof. The question is bound to recur again and again, and the Courts will be plagued with re-examinations of the issue in the other nine Circuits, including the Second and Fourth Circuits, where a conclusion, contrary to the deci-

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5 **Women's Wear**, Issue of October 17, 1944, "* * * The Court appears to have consolidated the jurisdiction of the National Labor Relations Board over most, if not all, of the department stores. * * *"; **On the Line**, publication of the American Retail Federation, Volume I, No. 9, Issue of October 21, 1944.

sion of the Eighth Circuit in this case, was reached.[6] The resultant confusion will be heightened by the very recent characterizations from this Court of retail operations, which point to a result opposed to that of the Eighth Circuit.[7] On every hand, it is evident that, for instance, the profession will not accept as final the startling assumption that 0.0024% of interstate sales is sufficient to confer jurisdiction upon the National Labor Relations Board.

But there are more immediate reasons why the Petition for Certiorari should be re-examined—

(1) Exemplifying the inexorable recurrence of the jurisdictional question, there is now before this Court, awaiting action, the identical jurisdictional question in *M. E. Blatt Company, Petitioner, v. National Labor Relations Board, Respondent,* No. 553, October Term 1944, involving a like department store.[8] Such case presents a question as to the jurisdiction of the National Labor Relations Board in every respect similar to the instant case. The reassertion of such question in the *M. E. Blatt Company Case* demonstrates—

First: That the question of the jurisdiction of the Board is still open and unsettled; and

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6 **Consolidated Edison Company v. National Labor Relations Board** (C. C. A. 2), 95 Fed. (2d) 390, 393, aff'd 305 U. S. 197, 83 L. ed. 126; **National Labor Relations Board v. White Swan Company** (C. C. A. 4), 118 Fed. (2d) 1002, cert. ret'd. unans'd. 313 U. S. 23, 85 L. ed. 1164.

7 **McLeod v. Threlkeld,** 319 U. S. 491, 494, 87 L. ed. 1538, 1541; **Walling v. Jacksonville Paper Company,** 317 U. S. 564, 570, 87 L. ed. 460, 467.

8 Certiorari being sought from the decision of the Circuit Court of Appeals for the Third Circuit in **M. E. Blatt Company v. National Labor Relations Board** (C. C. A. 3), 143 Fed. (2d) 268.

Second: That the question is of such public importance that it will, undoubtedly, continue to come before this Honorable Court time and again, until it is finally and definitely disposed of. Thus, "it appears the question must later be taken because of conflict," within the recent pronouncement of this Court considering the grant of a rehearing after the denial of Certiorari.[9]

(2) The National Labor Relations Board itself has taken cognizance of the immensity of what its legal department has wroth, and has, accordingly, recently published a decision retrenching the field of its operations and—most important in its impact upon this case—restated the jurisdictional norm or yardstick, differently than the decision of the lower Court in this Case. In the case of *In re McDonald Co-operative Dairy Company*, 58 N. L. R. B. No. 110, 15 L. R. R. 148, Issue of October 9, 1944 (and, therefore, since this case was lodged herein) the Board viewed the operations of a dairy products processing and distributing company, although not wholly unrelated to interstate commerce, as "essentially local in character" and, therefore, declined to assert jurisdiction, because out-of-state sales and purchases were not substantial in comparison to intrastate sales and purchases.[10] Thus, the National Board has introduced two new concepts into the jurisdictional investigation, namely, whether

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9 R. Simpson & Company, Inc., v. Commissioner of Internal Revenue, supra.

10 The Board opinion reads: "While we do not find that the operations of the Company are wholly unrelated to commerce, in view of the essentially local character of the Company's business, we do not believe that the policies of the Act will be secured by asserting jurisdiction in this case. Accordingly, we shall dismiss the Petition."

the operations of the employer are "essentially local in character," and whether "out-of-state sales and purchases are substantial in comparison to intrastate sales and purchases." The Board has further conceded that "the operations of the Company may not be wholly unrelated to (interstate) commerce," and yet the business or the employer may be immune to the operation of the National Labor Relations Act.

The confusion is, consequently, compounded, as the dividing line is left by the Board to rest on an adjective. Yet, who would say, as the Press has inquired, that 0.0024% of interstate sales were substantial? Will this Honorable Court say that a retail department store of modest proportions is not "essentially local in character"? This case pre-eminently poses these questions of public importance.

In view of the vacillation of the Board itself upon this important question, this Court should finally, definitively and authoritatively receive and dispose of the question, to avoid inevitable administrative chaos.

(3) The public reactions to the denial of Certiorari on October 16, 1944, have been sufficiently portrayed to indicate that such denial has not served to settle the minds of the incredulous. The confusion has been heightened, rather than allayed. The field of "small business" has been profoundly stirred by the visualization of the train of competitive factors, which will ensue, as this

business or that business will seek to distinguish itself from the effect of the denial. The first reaction, that, even, the lowly peanut stand, stocking itself from outside of the state, comes under the Wagner Act, will give way to an opposite determination and a wide-spread effort at resurgence of exclusive state authority under the Little Wagner Acts of the several states. There will be no complacence with the indicated re-division of the regulatory field. "Small business" will assert itself. The disharmony, which will attend such effort, should now engage the attention of this Honorable Court to settle at the threshold the question of jurisdiction.

CONCLUSION

The important area of the coverage of a Federal Act over a vast segment—perhaps the largest, at least, in point of number of employers affected—of the business of the Nation, in view of the foregoing new questions presented, should be re-surveyed with an eye to resolving the conflict in decisions of the lower Court and other Circuit Courts of Appeals and the dissonance of the lower Court's decision with many decisions of this Honorable Court, as set forth in our Original Brief and our Reply Brief.

We submit that, on such reinvestigation, the conflict and dissonance, respectively, will become patent, and that the urgency and propriety of grant of Certiorari will become evident.

WHEREFORE, Petitioner prays that the Order of Denial of Writ of Certiorari be vacated and that such Writ issue as heretofore prayed.

Respectfully submitted,

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November 4, 1944.

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We CERTIFY that this Petition for Rehearing is presented in good faith and not for delay.

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